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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. GILBERTO ESTEBAN CARDONA, Defendant and Appellant.	C079367 (Super. Ct. No. 13F05886)

Defendant Gilberto Esteban Cardona was a scrawny seventh grader when he began associating with the Howe Park Sureños for protection in his violent neighborhood, and by the time he was 18 he shot and killed someone while riding his bicycle from a wedding to his friend's house. A jury found him guilty of second degree murder and firearm and gang enhancements. Though the circumstances of the crime are sociologically and morally haunting, his appeal is legally straightforward and presents no difficult issues of law or fact. We conclude the court did not abuse its discretion by admitting evidence of his codefendants' convictions and there is sufficient evidence to support the jury's findings of the two predicate offenses necessary to sustain the gang

enhancement. Sadly, another young man must spend 40 years to life in state prison and a young father, Jesus Macias, is dead as a result of the gang epidemic in Sacramento neighborhoods.

FACTS

Few factual details are necessary for resolution of the issues presented on appeal. Indeed, few material facts are disputed. Defendant is an admitted and validated member of the Howe Park Sureños criminal gang. He had gang-related tattoos, he associated regularly with other Howe Park Sureños, and he had regular contacts with law enforcement related to gang activity. His two older brothers had been shot by rival Norteño gang members.

On the night of September 28, 2013, defendant and the victim were both armed. As defendant left a wedding reception on his bicycle, the brother of the bride gave him a gun. Macias, who had been partying at a neighbor's house with his children, left to buy more beer, armed with at least one, and possibly two, guns. He also carried a speed loader in his pocket, used to quickly load a revolver. Unfortunately, the two armed men were to encounter each other at a brawl outside the convenience store where Macias went to buy his beer.

The brawl began in the store between Macias and two Howe Park Sureños gang members and then spilled out into the gas station. Surveillance cameras captured the fight and the ensuing shooting. As Macias stumbled out of the store, a handgun fell from his waistband. He retrieved it and put it back in his pants. A witness described the gun as a chrome revolver. A third gang member joined the fight. A witness heard someone shout "Howe Park," both inside and outside the store.

Defendant arrived on his bicycle and observed the fight. He knew the three gang members who were assaulting Macias. Macias was attempting to defend himself against the attackers, and as he got free, he began to run away. Defendant testified that Macias dropped another gun, picked it up, and had it in his hand when defendant shot him. He

told the jury he was afraid Macias would shoot him. His three "homies" scattered. As Macias ran past him, defendant panicked and shot him in the back. On the surveillance video, defendant can be seen walking up to Macias's body and taking his gun. Macias died at the scene. A gunshot residue test performed on Macias after his death was positive for gunshot residue on his hand.

Defendant sought refuge at the home where Macias had been enjoying a barbeque with his children before he left on his fatal trip for more beer. Defendant told Julio Arriaga, someone he had known in elementary school, "I think I killed someone," and asked Arriaga to hide him. Defendant removed a black revolver from his jacket pocket and appeared nervous and scared. He left the house when asked, apologizing for scaring the children.

Defendant testified he was afraid Macias would shoot him as retaliation for the beating he had just taken. He shot him to protect himself. He picked up one gun from the ground and, moments later, took a second gun from Macias's waistband. He testified he did not fire to benefit any street gang.

DISCUSSION

I

Sufficiency of the Evidence to Support the Gang Enhancement

Until the California Supreme Court's recent decision in *People v. Prunty* (2015) 62 Cal.4th 59 (*Prunty*), prosecutors could prove a criminal street gang enhancement by introducing evidence of predicate offenses committed by gang members from different subsets of criminal gangs or from a subset different from the umbrella organization. *Prunty* marks, however, a significant change to the prosecution's burden of proof. "[W]e conclude that where the prosecution's case positing the existence of a single 'criminal street gang' for purposes of [Penal Code] section 186.22[, subdivision] (f) turns on the existence and conduct of one or more gang subsets, then the prosecution must show some associational or organizational connection uniting those subsets." (*Prunty*, at p. 71.)

"Whatever theory the prosecution chooses to demonstrate that a relationship exists, the evidence must show that it is the same 'group' that meets the definition of [Penal Code] section 186.22[, subdivision] (f)—i.e., that the group committed the predicate offenses and engaged in criminal primary activities—and that the defendant sought to benefit under [Penal Code] section 186.22[, subdivision] (b)." (*Prunty*, at p. 72.)

Since one of the predicate offenses offered by the prosecution in this case was committed by a member of the Sureños and the second was committed by a member of the subset, the Howe Park Sureños, defendant insists there is insufficient evidence to support the gang enhancement because the prosecution failed to show the requisite "togetherness" of the umbrella organization, the Sureños, with its local subsidiary, the Howe Park Sureños. We disagree. Simply put, *Prunty* does not apply to these facts.

We begin with the statutory context. The gang enhancement imposes additional punishment for felony convictions "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." (Pen. Code, § 186.22, subd. (b)(1).) Penal Code section 186.22, subdivision (f) defines "criminal street gang" as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in [the statute], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." A "pattern of criminal gang activity" is "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of [certain] offenses [identified in the statute], provided at least one of these offenses occurred after the effective date of [the law] and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons." (Pen. Code, § 186.22, subd. (e).)

The court in *Prunty* saw the core question presented as one of statutory construction. (*Prunty, supra,* 62 Cal.4th at p. 71.) "This case requires us to decide what it means to constitute an 'organization, association, or group,' as well as how the STEP [Street Terrorism Enforcement and Prevention] Act's various elements of the 'criminal street gang' definition affect the types of theories about a criminal street gang's existence that the prosecution may offer." (*Ibid*.) But the problem the court faced in *Prunty* is not a problem we face here. In *Prunty* the prosecution held Norteños out as the "criminal street gang" the defendant sought to benefit, but the predicate offenses it offered to prove a "pattern of criminal gang activity" were committed by members of different subsets. The prosecution failed to provide sufficient evidence of a link between the subsets and the umbrella group to show the subsets self-identified as associating with the umbrella group and demonstrated that association through their conduct. (*Prunty,* at p. 94 (conc. & dis. opn. of Corrigan, J.).) "The critical shortcoming in the prosecution's evidence was the lack of an associational or organizational connection between the two alleged Norteño subsets that committed the requisite predicate offenses, and the larger Norteño gang that Prunty allegedly assaulted Manzo to benefit." (*Prunty*, at p. 81.)

Here the prosecution sought to prove that the subset, the Howe Park Sureños, constituted a criminal street gang under the gang enhancement statute, not as in *Prunty*, where the prosecution focused on the umbrella organization, in that case, the Norteños. It is true that the Attorney General concedes one of the predicate offenses offered by the prosecution was committed by a member of the umbrella group, the Sureños. Separately, Sureño gang members Roberto Padilla and Juan Palacios were convicted of assault with a deadly weapon for a 2010 gang-related shooting. The other predicate offense involved Luis Prudente, a validated Howe Park Sureño member, who was convicted of first degree murder and assault with a deadly weapon in the 2010 shooting of a rival Norteño. If those were the only predicate offenses available to prove a pattern of criminal activity, we would be confronted with the same problem as in *Prunty*—a failure of proof to link

the subset to the umbrella organization. But here the problem is avoided because defendant's conviction of the pending charge for second degree murder also qualifies as one of the predicate offenses establishing a gang's pattern of criminality. (*People v. Loeun* (1997) 17 Cal.4th 1, 10-11, 14.)

Defendant is not satisfied with the proof of two predicate offenses, both of which were committed by members of the same subset, Howe Park Sureños, to establish that Howe Park Sureños are a criminal street gang. He reminds us that the Sixth Amendment requires the jury to find beyond a reasonable doubt the existence of each fact necessary to increase the defendant's sentence (*Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*)) and argues that we cannot determine beyond a reasonable doubt that the jury utilized the charged crime and the predicate act committed by a Howe Park Sureño to prove the gang enhancement. In essence, he would have us use *Apprendi* to upend the well-established standard of review of the sufficiency of the evidence.

We must review the whole record in the light most favorable to the prosecution and draw all reasonable inferences in favor of the judgment in our search for evidence that is credible and of solid value. We restrict our search for substantial evidence; we cannot reweigh the credibility of the witnesses or the weight of the evidence, for those tasks are the exclusive province of the jury. Not only must we review the record in favor of the prosecution, but we must presume "*in support of the verdict the existence of every fact the jury could reasonably have deduced from the evidence*." (*Prunty, supra*, 62 Cal.4th at p. 86, (con. & dis. opn. of Cantil-Sakauye, C.J.), citing *People v. McCurdy* (2014) 59 Cal.4th 1063, 1104.)

Here we need infer little. We know the jury found defendant guilty of second degree murder as a lesser included offense to the charged offense of murder. That predicate offense was committed by defendant, a validated member of the Howe Park Sureños. The prosecution also presented evidence of the other two predicate offenses described above, and we must presume the jury found those to be true. Although one of

the predicate offenses was committed by a Sureño, the umbrella group, the other was committed by members of Howe Park Sureños, the relevant subset. Thus, there was sufficient evidence of two predicate offenses committed by members of the same subset defendant committed the murder to benefit.

Even if defendant's *Apprendi* challenge is construed as an argument that the jury must unanimously agree on the predicate offenses, defendant cannot prevail. "[I]n defining a 'criminal street gang,' the Legislature required a 'pattern' of criminal activity. The term 'pattern' suggests that the Legislature was primarily concerned with an entire course of conduct, not with individual acts. [Fn. omitted.] Consequently, we believe the 'continuous-course-of-conduct exception' may be applied to the 'pattern of criminal gang activity' element of [Penal Code] section 186.22, subdivisions (a) and (b)(1). This means, of course, that the jury was not required to unanimously agree on which two or more crimes constituted [the gang's] pattern of criminal activity." (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1528.)

In sum, we conclude *Prunty* does not apply to the facts before us because the predicate offenses were committed by gang members in the same subset and defendant sought to benefit that same gang. Construing the evidence and drawing all inferences in favor of the prosecution, there is sufficient evidence of at least two predicate offenses. We reject defendant's creative attempt to use *Apprendi* to overturn the standard of review of a sufficiency challenge. And finally, even if we extended the logic of defendant's *Apprendi* argument to a claim the jury should have been instructed they must unanimously agree on the predicate offenses they utilized to find a pattern of criminal activity, the continuous-course-of-conduct exception applies and unanimity is not required. Defendant's objection to the gang enhancement therefore fails.

II

Abuse of Discretion in Admitting Codefendants' Convictions?

The three Howe Park Sureños who beat up Macias before defendant shot him entered pleas of no contest to assault by force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4)) and admitted that the assault was committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members pursuant to Penal Code section 186.22, subdivision (b)(1). The trial court granted the prosecution's request to take judicial notice of the convictions and admissions, and the jury was instructed accordingly. Defendant contends the trial court abused its discretion by admitting such highly prejudicial and cumulative evidence with minimal probative value. We disagree.

Evidence Code section 352 allows the trial court to exclude otherwise relevant evidence if its probative value substantially outweighs the probability that its admission will create substantial danger of undue prejudice. (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1035.) "Evidence is substantially more prejudicial than probative . . . if, broadly stated, it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome.' [Citation.]" (*People v. Waidla* (2000) 22 Cal.4th 690, 724.) Because the trial court is accorded broad discretion to determine whether evidence is substantially more prejudicial than probative, the court's ruling will be sustained absent an abuse of discretion. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1226.)

Defendant insists that evidence of other gang members' no contest pleas and admissions posed an intolerable risk of unfairness. He suggests their conduct was irrelevant to whether defendant was guilty of murder and merely invited the inference of guilt by association. He asserts the evidence is highly inflammatory and totally unnecessary given the abundance of other evidence to establish the requisite pattern of criminal conduct. In short, the evidence, in defendant's view, is cumulative and should have been excluded. He is mistaken.

We disagree the evidence was irrelevant. The prosecution argued, and the trial court agreed, the evidence was relevant to show a more recent predicate offense to satisfy the prosecution's burden to prove the Howe Street Sureños' pattern of criminal conduct. Evidence that three Howe Street Sureño members committed an assault, the first potential predicate offense listed in Penal Code section 186.22, subdivision (e), had a strong probative value tending to demonstrate the necessary pattern.

Nor do we believe the risk of undue prejudice was substantial, let alone intolerable. The other gang members' assault on the victim was totally separate from the shooting. They had already pummeled Macias both inside and outside the store before defendant rode up on his bike. Indeed, he described the fight as unfair because there were three assailants against one victim. Defendant's criminal liability was not contingent upon any of the assaultive conduct by his fellow gang members. Additionally, as the Attorney General correctly points out, the defense strategy was not undercut by their guilt since whether or not they assaulted Macias had no bearing on whether defendant actually feared for his life. If anything, the evidence may have bolstered the self-defense strategy in that it added credibility to defendant's testimony he feared the victim would retaliate against him for the brutal beating he had sustained at the hands of other Howe Park Sureño gang members.

Nor would the evidence surprise or inflame the jurors. The gang expert provided them a basic tutorial on Howe Park Sureño gang culture, including the regular commission of violent crimes by gang members. Thus, the jurors were well acquainted with the gang's propensity for violence, including assault, and the assault of Macias merely fit the profile of the type of behavior gang members engaged in to instill fear in the community and command respect.

Because the jurors had been so well acquainted with the gang's modus operandi, defendant argues the evidence of the convictions and admissions was simply cumulative. He forgets the prosecution had the burden to prove that Howe Park Sureños were

engaged in a pattern of criminal conduct. While two predicate offenses constitute the minimal number necessary to establish the requisite pattern, additional offenses, particularly when they were more recent than the other predicate offenses the prosecution offered, provided stronger evidence of a true pattern. The trial court's admission of the convictions was a reasonable exercise of discretion under Evidence Code section 352.

Citing *People v. Cummings* (1993) 4 Cal.4th 1233 (*Cummings*), defendant maintains that a coparticipant's guilty plea or conviction is inadmissible to prove the defendant's guilt. *Cummings* is inapposite. *Cummings* involved a joint trial and the prosecution's attempt to use a codefendant's guilty plea to prove the other defendant committed the crime. (*Id*. at p. 1321.) The court found that one codefendant's admissions were only probative as to the other codefendant if the jury inferred they were partners in the entire criminal enterprise, an inference too weak to justify admission in light of the evidence's prejudicial impact. (*Id*. at p. 1322.) Thus, the codefendant's plea was inadmissible under Evidence Code section 352.

Cummings does not, however, establish a rule that evidence of a codefendant's guilty plea is per se inadmissible. Unlike in *Cummings*, defendant's fellow gang members were not alleged to have worked in concert with defendant to commit the later shooting. Their responsibility for the prior assault had absolutely nothing to do with defendant's liability for murder. Rather, the other gang members' convictions and admissions were probative of an essential collateral fact that the prosecutor was obligated to prove—a pattern of criminal activity. Though proof of a pattern was required to prove the gang enhancement, it had nothing to do with his actual guilt or innocence of the murder alleged to have been committed for the benefit of the gang. Defendant's reliance, therefore, on *Cummings* is misplaced. A very different calculus faced the trial court here in determining whether the evidence should be excluded under Evidence Code section 352. Given the probative value of the evidence and the minimal risk of an undue

prejudicial impact on the jury, we can find no abuse of discretion to merit reversal of the judgment.

DISPOSITION

The judgment is affirmed.

RAYE, P. J.

We concur:

MAURO, J.

HOCH, J.